No. 101.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYMCZAK, JOHN K. MCKEE, ERNEST G. DRAPER and RUDOLPH M. EVANS, PETITIONERS,

v.

PEOPLES BANK OF LAKEWOOD VILLAGE, CALIFORNIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE PETITIONERS.

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OPINION BELOW.

The opinion of the United States Court of Appeals (R. 120-134) is reported at 161 F. 2d 636. There were two opinions in the District Court which were reviewed on the appeal below. The first (R. 11-23), which was rendered in connection with an interlocutory order denying petitioners' motion to dismiss for lack of a justiciable controversy, is reported at 64 F. Supp. 811. The second (R. 113-117), upon which judgment dismissing the action was entered, is not reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 14, 1947 (R. 134). The petition for a writ of certiorari was filed on May 23, 1947, and granted on October 13, 1947 (R. 135). The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

(1) Whether the Board exceeded its statutory authority in conditioning respondent's admission to the Federal Reserve System upon the maintaining of its independence of Transamerica Corporation.

(2) Whether respondent, having voluntarily accepted the Condition as a means of obtaining valuable federal privileges, is not estopped from challenging the validity of the Condition.

(3) Whether the District Court had jurisdiction to entertain a declaratory judgment action attacking the validity of the Condition, the Board having neither acted nor threatened to act under the Condition.

STATUTE INVOLVED.

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 43-50.

STATEMENT.

Petitioners are members of the Board of Governors of the Federal Reserve System (hereinafter referred to as the Board).[1] Respondent, Peoples Bank of Lakewood Village, California (hereinafter sometimes re-

[1] The term of office of John K. McKee expired on January 31, 1946. His successor qualified on April 4, 1946. For this reason the District Court dismissed the complaint as to him (R. 117). The Court of Appeals neither affirmed nor reversed this action.

ferred to as the Bank), is a state bank organized and chartered under the laws of the State of California (R. 2).

On November 28, 1941, the Bank applied to the Board to be admitted as a member bank in the Federal Reserve System (R. 3). On February 14, 1942, the Board instructed the Federal Reserve Bank of San Francisco to notify respondent that the Board was "unwilling to approve the application on the basis of the information now before it" (R. 49).

Thereafter, on February 20, 1942, respondent, by letter addressed to the Board, requested the Board to reconsider its application, calling attention among other things to the fact that certain individuals had taken over the stock interest of the West Coast Securities Company, amounting in the aggregate to 1,000 shares out of a total of 5,000 shares outstanding (R. 50-51). On March 11, 1942, the Bank was notified that the Board would be glad to reconsider the application provided the Bank could demonstrate:

> "1. That arrangements have been made by Mr. John S. Griffith, San Marino, California, for financing the purchase of his stock in a manner different from that in effect at the time of our investigation of your bank's application for membership, and that such arrangements are consistent with the other provisions of this letter.
>
> "2. That some change has been made in the arrangements for the use of the furniture and fixtures whereby the bank will be under no obligation to Capital Company or any other part of the Transamerica group.
>
> "3. That neither Transamerica Corporation nor any organization affiliated or closely identified with Transamerica Corporation or any other bank

holding company group has any interest, direct or indirect, in the applicant bank, and that the bank is in no manner obligated to any such organization.

"4. That all stockholders have stated in writing that they have no agreements or understandings, expressed or implied, with respect to the sale or transfer of the stock of the bank to any such organization, and that they do not intend to enter into any such agreements or understandings.

"5. That the bank was organized as a bona fide local, independent institution, and is expected to be continued as such." (R. 53-54)

In a letter dated April 23, 1942, respondent met the Board's conditions by forwarding to the Federal Reserve Bank of San Francisco (1) a statement by Mr. Griffith affirming that he had effected a different arrangement for financing his acquisition of Bank shares and that such arrangements had not been made with Transamerica Corporation or any organization affiliated or closely identified with Transamerica Corporation; (2) a declaration signed by all of respondent's directors that respondent was "organized as a bona fide local, independent institution", and that it was not obligated in any manner to Transamerica Corporation or any of its affiliated companies; and (3) a signed statement of each of respondent's stockholders that he had no arrangements, express or implied, with respect to the sale or transfer of the stock of the Bank owned by him to Transamerica or any of its affiliated companies and that he did not intend to enter into any such arrangements in the future (R. 54-58).

Based upon these representations the Board, by letter dated May 6, 1942 (R. 58-61), notified the respondent that its application had been approved sub-

ject to three standard conditions of membership[2] and one special condition of membership providing as follows:

"4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the

[2] Section 6(a) of the Board's Regulation H, under which respondent applied for System membership, provides as follows:

"(a) Conditions applicable to all institutions applying for membership.—Pursuant to the authority contained in the first paragraph of section 9 of the Federal Reserve Act, which authorizes the Board to permit applying State banks to become members of the Federal Reserve System 'subject to the provisions of this Act and to such conditions as it may prescribe pursuant thereto,' the Board, except as hereinafter stated, will prescribe the following conditions of membership for each State bank hereafter applying for admission to the Federal Reserve System and, in addition, such other conditions as may be considered necessary or advisable in the particular case—

"1. Such bank at all times shall conduct its business and exercise its powers with due regard to the safety of its depositors, and, except with the permission of the Board of Governors of the Federal Reserve System, such bank shall not cause or permit any change to be made in the general character of its business or in the scope of the corporate powers exercised by it at the time of admission to membership.

"2. The net capital and surplus funds of such bank shall be adequate in relation to the character and condition of its assets and to its deposit liabilities and other corporate responsibilities, and its capital shall not be reduced except with the permission of the Board of Governors of the Federal Reserve System.

"3. Such bank shall not engage as a business in issuing or selling either directly or indirectly (through affiliated corporations or otherwise) notes, bonds, mortgages, certificates, or other evidences of indebtedness representing real estate loans or participations therein, either with or without a guarantee, indorsement, or other obligation of such bank or an affiliated corporation."

> Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of extension of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationships, such bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System."

In its letter of notification the Board stated, *inter alia*, as follows:

> "The application for membership has been approved upon representations that the bank is a bona fide local independent institution and that no holding company group has any interest in the bank at the time of its admission to membership, and that the directors and stockholders of the bank have no plans, commitments or understandings looking toward a change in the status of the bank as a local independent institution. Condition of membership numbered 4 is designed to maintain that status."

As also stated in the Board's letter of May 6, 1942, before membership status could attach respondent was required to evidence its acceptance of the conditions outlined in the Board's letter of May 6, 1942, by formal resolution, a certified copy of which was required to be filed with the Federal Reserve Bank of San Francisco.

In February 1944 Transamerica Corporation, without prior approval of the Board and without the knowledge of the Bank, acquired a number of the Bank shares, which were registered in its name on the Bank's records, (R. 6). Respondent reported this fact to the Board and in December 1945 demanded that Condition

No. 4 be cancelled (R. 7). This demand was not complied with, and thereafter this proceeding was commenced by the Bank to have Condition No. 4 declared invalid and to enjoin the Board from enforcing the same; although it was not alleged in the complaint that the Board had made any attempt to enforce the Condition.

Petitioners first moved to dismiss the complaint in the District Court on the ground that, as they had not threatened to enforce the Condition, no justiciable controversy was presented by the pleadings (R. 10). In support of this motion petitioners submitted, in affidavit form, an excerpt from the minutes of the Board of January 28, 1946, as follows:

> "Upon consideration of the latest report of examination of the Peoples Bank, Lakewood Village, California, from which the Board concluded that there had been no substantial change in the control, management or policy of the bank resulting from the acquisition by Transamerica Corporation of certain shares of the bank's stock, the Board, by unanimous vote, decided that there was no present need in the public interest for any action by the Board with respect to the condition of membership of the bank relating to acquisition of its stock by Transamerica Corporation." (R. 10-11).

Petitioners' motion to dismiss was denied on March 14, 1946 (R. 23).

Thereafter petitioners filed their joint and several answer in which they set forth two defenses. The first was that the Bank, having enjoyed for almost four years the benefit of System membership which resulted from its voluntary acceptance of Condition No. 4, was estopped from challenging the validity of the Condition. The second defense was that the complaint failed to state facts upon which any relief could be granted (R. 23-24).

On this state of the record petitioners moved for judgment on the pleadings (R .25). The Bank countered with a motion for summary judgment, filing a number of affidavits in support of its motion (R. 25-111).[3] It was stipulated that any relevant and admissible facts contained in these affidavits might be considered by the District Court in considering both motions (R. 111). On June 3, 1946, that court granted petitioners' motion for judgment on the pleadings, holding that the Bank was legally estopped from challenging the Condition (R. 113-118). At the same time the court denied respondent's motion for summary judgment (R. 118). Judgment dismissing the complaint was entered on June 6, 1946 (R. 118). On appeal the court below reversed, Mr. Justice Edgerton dissenting (R. 120-134).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the District of Columbia erred:

(1) In holding that Condition No. 4 as literally construed is invalid because of an alleged unlawful "purpose" of the Board in imposing the Condition.

(2) In holding that the Board and its counsel made certain alleged "concessions" having the effect of modidying the literal terms of the Condition in the manner stated in the majority opinion.

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[3] In addition to stating the events leading up to the admission of the Bank to the System, which have been described in the preceding pages, these affidavits contain copies of general correspondence between the Board and Transamerica with relation to the Board's position respecting the bank expansion program of that corporation. In addition, they contain numerous statements by the Board and its officers in which they admitted that the law as it now stands does not empower the Board to disapprove bank acquisitions by bank holding companies generally.

(3) In holding that respondent is not legally estopped from challenging the validity of Condition No. 4.

(4) In failing to hold that the case was premature because the complaint fails to disclose a justiciable controversy.

(5) In overruling the judgment of the District Court.

SUMMARY OF ARGUMENT.

I.

The Board has the express power to impose conditions of membership "pursuant" to the Federal Reserve Act. Condition No. 4 appears on its face to be related to "character of management", "convenience and needs of the community to be served", as well as other special factors which the Board was required by the statute to consider in passing upon respondent's application. For this reason the Condition is one which is plainly "pursuant" to the Act.

Furthermore, the determination as to what conditions of membership should be imposed in a particular case requires the appraisal of imponderables calling for highly technical and expert judgment, judgment which Congress has entrusted to the Board. The courts will not substitute their judgment for that of an administrative agency in such a situation. Cf. *Adams* v. *Nagle*, 303 U. S. 532; *Apfel* v. *Mellon*, 33 F. 2d 805 (App. D. C.), certiorari denied 280 U. S. 585; *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U. S. 90, 112; *Phelps Dodge Corporation* v. *National Labor Relations Board*, 313 U. S. 177, 194.

The record does not support the conclusion reached by the majority below that the Board's "purpose" in imposing Condition No. 4 was "to check the growth of Transamerica Corporation". If the Board's motive

be a relevant consideration in this case, however, the facts which were before the court below supply a number of valid motives for the Board's action. They show (1) that, at or about the time of respondent's application, the Board considered the financial policies of the Transamerica management to be against the public interest and its bank expansion program to be unsound and had reason to believe that respondent was already under, or was about to come under, the control of Transamerica; (2) that the Board's opinion of the financial policies and bank expension program of Transamerica was concurred in by both the Comptroller of the Currency and the Federal Deposit Insurance Corporation, the latter having indicated its unwillingness to further extend the insurance liability of the United States to the Transamerica controlled group of banks; and (3) that Transamerica already controls a dominant portion of the banking offices and deposits in the five-State area of Arizona, California, Nevada, Oregon and Washington. In the light of these facts the Board could properly have imposed Condition No. 4 (1) to protect respondent from coming under the domination of a a management which the Board considered inimical to respondent's welfare or that of the Federal Reserve System; (2) to protect the United States Government against an over-extension of its insurance liability to the Transamerica controlled group of banks; and (3) to discharge its direct responsibility under the Clayton Act to carry out the national policy against restraints of commerce and monopolies. Cf. *National Broadcasting Company* v. *United States*, 319 U. S. 190.

II.

Nor was the lower court justified in rewriting the Condition in the light of certain "concessions" al-

leged to have been made by the Board and its counsel since this suit was commenced. None of these "concessions" evidence any intention on the part of the Board either to interpret Condition No. 4 in the manner found below or to limit the Board's right to enforce the Condition in a manner authorized by the statute.

III.

Petitioners also submit that, since respondent accepted the Condition as a means of obtaining valuable federal privileges which otherwise it would not have obtained, it is now estopped from challenging the validity of the Condition. In holding that whether or not waiver or estoppel has occurred in this case depends upon the validity of Condition No. 4, the majority below ignored fundamental principles defining the circumstances under which estoppels arise. The situation here is analogous to that in numerous cases in which this Court has held that one who obtains the privileges or benefits under a statute is thereafter estopped from challenging other provisions of that statute even on constitutional grounds. Cf. *Fahey* v. *Mallonee*, 332 U. S. 245; *United States* v. *City and County of San Francisco*, 310 U. S. 16; *White Star Bus Line* v. *People of Puerto Rico*, 75 F. 2d 889, (C. C. A. 1) certiorari denied, 296 U. S. 606.

IV.

As the record indisputably shows, the Board has neither acted nor threatened to take action under Condition No. 4. Furthermore, the Condition itself requires that before the Board may taken action thereunder it must give respondent sixty days' notice of an intention to invoke it. Under these circumstances there is no justiciable controversy of a definite and concrete character for the Court's determination.

ARGUMENT.

I.

THE CONDITION IS VALID.

Section 9 of the Federal Reserve Act grants specific authority to the Board to impose "such conditions" of membership "as it may prescribe" which are "pursuant" to that Act. The issue on the merits is therefore a relatively narrow one: Is Condition No. 4 one which is "pursuant" to the Federal Reserve Act. While theoretically this question opens a wide range of judicial inquiry—for it makes relevant an analysis of all of the provisions of the Federal Reserve Act and their functions in effectuating the statutory scheme—we think that in the instant case such inquiry may be restricted to a consideration of but two sections of the Act, which deal directly with the qualifications of non-member banks for admission to the System.

When it receives the application of a non-insured State bank (the situation in the case at bar), the Board is required by the statute to "consider" two sets of critical data respecting the applicant. The first, which relates to the bank's eligibility for admission to the System, concerns "the financial condition of the applying bank, the general character of its management, and whether or not the corporate powers are consistent with the purposes" of the Federal Reserve Act. (Section 9(3), 12 U. S. C. 322). The second, which relates to the bank's eligibility for federal deposit insurance coverage,[4] includes "the financial history and condition

[4] The federal deposit insurance system is created by Section 12B of the Federal Reserve Act (12 U. S. C. 264, et seq.), and it is therefore appropriate for the Board to take that section into account in prescribing conditions "pursuant" to the Act. Under the Act deposit insurance coverage may be obtained by a bank in one of two ways. It may apply directly to the Federal Deposit Insurance Corporation, in which event the Board takes no part in the con-

of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes" of the insurance section of the Act. (Section 12B(g), 12 U. S. C. 264 (g))

Condition No. 4 on its face relates to at least two of the subjects thus required to be considered by the Board in passing upon respondent's application. The first is the "general character of [the Bank's] management". It is elementary that the responsibility for supplying the management of a corporation is placed by law upon its stockholders. As pointed out in the majority opinion below, Transamerica is a large holding company "with extensive interests in many banks and in other corporations as well" (R. 124-125). The likelihood that Transamerica, by becoming a stockholder in the respondent Bank, might participate in or even supply the management of that institution—hence, affecting the "character" of that management—was a factor which was thus quite properly within the lawful range of the Board's inquiry under the statute. This Court has recognized that ownership of a majority of the voting shares of one corporation by another is not necessary in order to obtain practical working

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sideration of the bank's application. Or, as here, a non-insured bank may apply for membership in the System, in which event its admission automatically entitles it to federal insurance coverage. This, of course, makes it essential for the Board to take into consideration the applicant's qualifications for insurance in addition to the factors which it would otherwise consider. In fact, when it admits a non-insured bank to membership the Board is required to certify to the Federal Deposit Insurance Corporation that it has considered those qualifications. (12 U. S. C. 264(e)(2))

control of such company. "Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control . . . Domination may spring as readily from subtle or unexercised power as from arbitrary imposition of command. To conclude otherwise is to ignore the realities of intercorporate relationships." *North American Company* v. *Securities and Exchange Commission*, 327 U. S. 686, 693.

The terms of the Condition show that it is also related to "the convenience and needs of the community to be served by the bank", another subject which the Board was required by the statute to consider. As we have seen, the Bank's application was approved because of the Bank's character as a "bona fide local independent institution" (R. 60)—a condition which the Board obviously concluded was in the best interest of the community in which the Bank proposed to do business. The Board could properly have concluded that to permit Transamerica, with its vast chain of banks, to obtain an interest in respondent might not only affect the character of respondent's management but might also destroy the "independent" character of the Bank. As the Board pointed out in its letter of notification to the Bank, Condition No. 4, was "designed to maintain that status" (R. 60).

The Condition was thus plainly related on its face to matters which the Board was required by the statute specifically to consider;[5] this in itself negatives the idea

[5] While for obvious reasons the Board treats as confidential its action upon membership applications, nevertheless the Board has informed the Solicitor General that, over the years, it has imposed a wide variety of membership conditions, many of which are not dissimilar to the case at bar. Thus, the Board has required that, prior to membership, the applying bank "shall cause its wholly

that the Board acted "in the teeth of [the] statute" (*Adams* v. *Nagle*, 303 U. S. 532), or that the object sought to be accomplished by the Condition was "so unrelated to the tasks entrusted by the Congress to the [Board] as in effect to deny a sensible exercise of judgment". (*Gray* v. *Powell*, 314 U. S. 402) Under these circumstances, it is submitted that the judicial inquiry into the validity of Condition No. 4 should be at an end, for "where the regulation [condition] is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies." *Pacific States Co.* v. *White*, 296 U. S. 176, 186. Obviously, it was never intended by Congress that recourse to the courts should be had in all instances to review the Board's appraisal of such imponderables as "character of management", "the convenience and needs of the community to be served", and the others outlined above. The statute neither requires the Board to hold hearings or to make findings respecting these subjects, nor does it provide for judicial review of the Board's determinations thereupon. Here, as in other governmental schemes involving highly technical subjects,

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owned affiliate . . . to dispose of any shares of the bank's own stock which may be owned by the company"; or that the bank "shall dispose of all stock you now hold or may acquire in the ———— ———— Title and Mortgage Company"; or that the bank "shall require that the offices of the ———— Building and Loan Association be removed from the banking offices of such bank and shall confine its relations with such association to the usual banking services offered to any customer of such bank"; or that the bank "shall dispose of the ownership of all stock held in the ———— National Bank, or effect a consolidation with that bank"; or that "the management of the new bank shall be satisfactory to the Federal Reserve Agent at Boston."

Congress created an administrative board and provided it with the necessary means for dealing with the subject on an expert and definitive basis.[6]

The rule is clear that the courts will not substitute their judgment for that of an administrative agency in a matter that is within the discretionary authority of such agency. Here the Board is given a wide discretion to impose "such conditions as it may prescribe pursuant" to the Act. And the position has been consistently taken at all levels of the federal judiciary that the orders and decisions of the bank supervisory agencies of the kind involved in the instant case call for the exercise of the broadest kind of expert judgment and discretion which the courts will not undertake to review. Thus, the case of *Apfel* v. *Mellon, et al.*, 33 F. 2d 805, certiorari denied 280 U. S. 585, involved a situation almost identical to that here presented. In that case plaintiffs sued to compel the members of the Board to issue a permit permitting them to engage in foreign banking activities. Under the provisions of Section 25(a) of the Federal Reserve Act (12 U. S. C. 611), five or more persons may file with the Board articles of association for the purpose of engaging in the business of foreign banking and "after the Board of Governors of the Federal Reserve System has approved the same and issued a permit to begin business," the association becomes a body corporate with certain statutory powers. Plaintiffs had duly filed their

[6] "The soundness of the judgment exercised by the individual or body to whom the task was confided would depend largely upon the extent both of the knowledge of the special subject possessed and of the experience had in dealing with this particular class of problems. The conclusions reached would rest largely upon considerations not entirely susceptible of proof or disproof." *Williamsport Wire Rope Company* v. *United States*, 277 U. S. 551.

articles of association with the Board, but the latter declined to approve the same. Plaintiffs brought suit for a writ of mandamus to compel the Board to issue the permit. The case was dismissed in the District Court, and the Court of Appeals affirmed, stating, *inter alia*, as follows:

> "In the instant case it is clear that Congress was providing a means for conferring special and important privileges upon such corporations as should be organized under the Edge Act. An abuse by any corporation of the powers thus granted to it might involve grave consequences to our public service. It is reasonable to believe that Congress intended that a careful investigation should be made by the Federal Reserve Board concerning the character and competency of the incorporators of such an enterprise, as one of the means of determining whether to grant or withhold their approval of the application for incorporation. Moreover, it should be noted that the act repeatedly provides for an 'approval' by the Board as a prerequisite to proceedings authorized thereunder, and in all such instances the term plainly implies the exercise of consideration, judgment, and discretion by the Board."

This Court has affirmed a similar doctrine. In *Adams* v. *Nagle*, 303 U. S. 532, plaintiff sought to have set aside an order of the Comptroller of the Currency levying certain assessments under the double liability provisions of the National Bank Act against stockholders of closed banks. In refusing to inquire into the basis for the Comptroller's order, the Court said:

> "The respondents rely upon decisions holding that a bill in equity or a writ of mandamus will lie to compel an executive officer to comply with the plain mandate of a statute. These have no appli-

cation for they deal with a situation wholly foreign to that here presented. Where a statute vests no discretion in an executive officer but to act under a given set of circumstances, or forbids his acting except upon certain named conditions, a court will compel him to act or to refrain from acting if he essays wholly to disregard the statutory mandate; *but if a discretion is vested in him, and he is to act in the light of the facts he ascertains and the judgment he forms, a court cannot restrain him from acting on the ground that he has exceeded his jurisdiction by reason of an error either of fact or law which induced his conclusion.* Plainly, therefore, the respondents are wrong in asserting that as the facts set forth in their bill charge the Comptroller with an error of law, he exceeded his authority." (Italics ours)

See also *Kennedy* v. *Gibson*, 8 Wall. 498, 505; *National Bank* v. *Case*, 99 U. S. 628, 634; *Bushnell* v. *Leland*, 164 U. S. 684; *Raichle* v. *Federal Reserve Bank*, 34 F. 2d 910 (C. C. A. 2); *United States Savings Bank* v. *Morgenthau*, 85 F. 2d 811 (App. D. C.), certiorari denied, 299 U. S. 605, rehearing denied, 301 U. S. 666.

The majority below rejected the argument that, in imposing Condition No. 4, the Board was acting within the permissible range of its statutory discretion. It did so on the theory that the Condition was rendered invalid by an alleged "purpose" which the court found to have motivated the Board at the time it imposed the Condition. That "purpose," as found by the court, was "to check the growth of Transamerica Corporation, which the Board considered to be already too large" (R. 125). The opinion, having thus stated the "purpose" of Condition No. 4, goes on at some length to demonstrate the fact, which the Board admitted below and has never denied, that, while the Board

enjoys some power of direct regulation over bank holding companies,[7] such power does not include the the authority to approve or disapprove bank holding company expansion. The reasoning of the opinion seems to be that Condition No. 4 was but an attempt by the Board "to implement its theory that the enlargement of bank holding companies should be forbidden" (R. 125) and, hence, was unrelated to any legitimate considerations affecting the Bank's admission to the Federal Reserve System. We believe that the error of this position may be readily demonstrated.

In the first place, even assuming the relevance of the Board's motive in imposing Condition No. 4, we do not believe the record in this case supports the finding of the majority below that the Board's purpose was "to check the growth of Transamerica Corporation." The complaint does not allege any such purpose. The Board's answer was limited solely to legal defenses, hence it contains no facts upon which such a conclusion could have been drawn. The only other material in the record is that contained in certain affidavits submitted in conjunction with respondent's motion for summary judgment. Aside from copies of the purely formal documents and correspondence attending respondent's membership application, a good portion of this material consists of copies of certain correspondence between the Board and Transamerica (R. 69-96). But this correspondence, as even a cursory examination will show, has not the remotest connection with Condition No. 4 or with respondent Bank. It deals with a variety of problems with which the Board was confronted in its supervisory relationships with Transamerica and the Bank of America National

[7] See Section 5144 of the Revised Statutes, 12 U. S. C. 61, which is set out in the Appendix hereto at page 45 et seq.

Trust & Savings Association. It does contain a number of references to the attitude of the Board (and that of the Comptroller of the Currency and the Federal Deposit Insurance Corporation) respecting the Transamerica bank expansion program. As stated, however, none of these make any reference whatever to respondent or to Condition No. 4.

In the second place, if the lower court was justified in seeking out the motive behind Condition No. 4, it at least was under a duty, we submit, to credit the Board with having entertained a lawful purpose if any of the facts which were before that court would justify such a conclusion. After all, "official acts of public officers" are supported by a "presumption of regularity" (*United States* v. *Chemical Foundation,* 272 U. S. 1, 14), not the contrary. And there were many facts before the lower court from which it could have found a number of entirely lawful motives, directly traceable to the statute itself, which give valid support to the Board's requirement that respondent maintain its independence of Transamerica.

For example, the record shows that, at or about the time the Board acted upon respondent's application, it was of the opinion that the Transamerica financial policies were contrary to the public interest and the Transamerica bank expansion program was unsound. This fact appears in a letter from the Board to Transamerica dated November 13, 1942, in which the Board stated, *inter alia,* as follows:

> "As for the Board's position, until it is satisfied that the financial policies pursued by Transamerica Corporation and its affiliated institutions are consistent with the public interest, it will consider as unsound their efforts to continue an expansion program by whatever means, including

> the organization of new State banks, the acquisition of control of existing State banks; or the conversion of national banks to State banks, and the establishment of branches thereof." (R. 84)

The record also shows that, contrary to the conclusion stated by the court below (R. 125), the Board had good reason for believing that respondent, at the time it applied for System membership, might already be beneficially owned by or at least affiliated with Transamerica. Thus, the record shows that arrangements had been made between respondent and Transamerica for the use of Transamerica-owned furniture and fixtures in commencing its operations.[8] It also shows that one-fifth of respondent's shares were originally owned by West Coast Securities Company (R. 51). While the record does not show what affiliation that company had with Transamerica, nevertheless, it does show that its shares of respondent's stock were transferred to five individuals before the Bank requested reconsideration of its application and that the fact of this transfer was specifically called to the Board's attention in respondent's letter urging such reconsideration (R. 51). When we add the further fact that this transfer was effected after a conference in Washington between one of respondent's directors and officials of the Board, in which the director was told that the Board would reconsider respondent's application only after it had received "assurances" of the Bank's independence of Transamerica (R. 62), we think the

[8] This arrangement was subsequently explained in the Bank's letter to the Board of April 23, 1942 (R. 55), and assurances were also subsequently given by all the directors that the Bank was not obligated to any company in the Transamerica group for the purchase of its furniture and fixtures.

record sustains the inference that West Coast Securities Company was a Transamerica affiliate.

In addition, it also appears that the purchase of the shares originally acquired by one of respondent's directors had been financed by Transamerica or one of its affiliated companies. This is shown by the requirement stated in the Board's letter of March 11, 1942, that such director finance such purchase in a different manner (R. 53), plus the director's subsequent statement (R. 56) that he had effected a "different arrangement" for financing those shares, and that such arrangements had not been made with Transamerica or its affiliates. The fact that Transamerica had thus undertaken to finance the purchase of other of respondent shares naturally suggested questions as to where the beneficial ownership of such shares might be lodged.

All of these facts supply ample reason for the Board's concern that Transamerica had marked respondent for inclusion within its vast banking system. Being also of the opinion that the management policies of Transamerica were at that time both unsound and against the public interest, the Board was clearly justified in apprehending the effect of those policies upon respondent should Transamerica thereafter acquire an interest in the Bank. Certainly the fact that the Board deemed the further expansion of Transamerica contrary to the public interest would not mean that restrictions upon respondent so as to preserve its independence of Transamerica were not conditions related to the character of respondent's management, a matter which the Board was thus specifically required to consider.

And in imposing the restrictive requirements of Condition No. 4 the Board was protecting not only the respondent Bank, but the Federal Reserve System as

well.[9] It is clear, of course, that the member banks constitute the bloodstream of that System. If they are sound, virile institutions, then the over-all banking structure of which they are a part will likewise be strong and healthy, and capable of producing maximum results in the public interest. On the other hand, if even one of them is weak and unhealthy, then it drains the strength of the others. Confronted with the facts which the investigation of respondent's application had disclosed, and entertaining the opinion which it did concerning the possible adverse effect upon respondent's management should Transamerica acquire a stock interest therein, the Board's plain duty under the statute required that it take the precautionary step which it did. We think the facts related above clearly supply a valid "purpose" for such action.

There are other facts in the record from which the majority below could have found another valid motive for the imposition of Condition No. 4. The record shows that at the time of respondent's application the Board's opinion as to the unsoundness of the Transamerica bank expansion program was shared by the two other federal bank supervisory agencies, the Comptroller of the Currency and the Federal Deposit Insurance Corporation (R. 69-70, 82-85). Indeed, the latter had "indicated its unwillingness . . . to insure any newly organized State nonmember bank in which Transamerica Corporation ha[d] a substantial interest." (R. 84) These facts are important not only because the judgment of these agencies gives valid and expert support to the Board's opinion, but also because

[9] As stated in the preamble to the Federal Reserve Act, one of the broad purposes of that Act was "to establish a more effective supervision of banking in the United States," and thus to create and maintain a sound banking system for the country.

it emphasizes another facet of the Board's responsibility in passing upon respondent's application. As pointed out above, the Board, by admitting a non-insured bank to membership, automatically grants to it federal deposit insurance coverage. There are of course obvious reasons for not permitting too large a portion of such insurance to cover a single organization. And if the Federal Deposit Insurance Corporation, the agency primarily charged with the administration of this phase of the federal banking scheme, itself had determined that Transamerica's bank expansion program was so unsound as to justify a refusal to further extend the insurance liability of the United States to the Transamerica banking group, then it seems clear that such determination was entitled to the highest respect by the Board. This situation supplies another "purpose" directly traceable to the statute itself.

And there is still another valid "purpose", which could have been found by the majority below. The lower court was referred to, and asked to take judicial notice of, a table appearing in the Congressional Record (Vol. 90, Part 10, 78th Cong., 2nd Session, page A3018) in which the size and extent of the Transamerica banking empire is shown as of December 31, 1943. That table is as follows:

BANKS AND BRANCHES IN THE TRANSAMERICA CORPORATION GROUP COMPARED WITH ALL BANKS AND BRANCHES IN THE SAME STATES, DEC. 31, 1943.

[Amounts in thousands of dollars]

	Banks	Branches	Banks and branches	Deposits of banks and branches[10]
Transamerica Corporation banks:[11]				
Arizona	2	3	5	53,082
California	12	495	507	3,660,629
Nevada	4	10	14	80,081
Oregon	9	39	48	370,436
Washington	1	8	9	71,233
Total	28	555	583	4,235,461
All banks in same States:				
Arizona	12	26	38	229,204
California	208	827	1,035	8,859,654
Nevada	10	13	23	99,098
Oregon	72	68	140	909,136
Washington	131	88	219	1,579,366
Total	433	1,022	1,455	11,676,458
Ratio (percent) of Transamerica banks to all banks in same States:				
Arizona	16.7	11.5	13.2	23.2
California	5.8	59.9	49.0	41.3
Nevada	40.0	76.9	60.9	80.8
Oregon	12.5	57.4	34.3	40.7
Washington	.8	9.1	4.1	4.5
Total	6.5	54.3	40.1	36.3

[10] Separate deposit figures for branches are not available.

[11] Includes Bank of America, N. T. & S. A., San Francisco, and National Bank of Washington, Seattle, which are not included in the "26 Transamerica-owned banks" shown in the Transamerica Corporation 1943 annual report but are shown there as "Banks in which Transamerica Corporation and its subsidiaries have substantial minority interests."

NOTE.—The number of branches shown above does not include banking facilities at military reservations provided through arrangements made by the Treasury Department with banks designated as depositories and financial agents of the Government.

This table clearly shows the dominant position which Transamerica has attained over the banking and credit facilities of the five-State area of Arizona, California, Nevada, Oregon and Washington. Each new bank which it acquires further increases this position and *pro tanto* decreases the remaining banking competition in that area. In the light of these figures, the Board, in acting upon respondent's application, might properly have concluded that, as a dispenser of federal privileges in the banking field, it should take into account the national policy against restraints of commerce and monopoly, and should condition respondent's admission to System membership in the light of the statutory objectives of the Sherman and Clayton Acts. This is so, we submit, even if it were not true, as we shall presently show, that the Board is charged with specific responsibility for carrying out certain phases of this policy in the banking field. Authority for this proposition is found in *National Broadcasting Company* v. *United States*, 319 U. S. 190. In that case the Federal Communications Commission, acting under its general powers to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions" of the Federal Communications Act, promulgated a series of regulations which, among other things, were directed to the preservation of competition within the broadcasting field. It was contended that this part of the regulations was not necessary to "carry out the provisions" of the Communications Act and constituted "an ultra vires attempt by the Commission to enforce the antitrust laws." The Court disposed of this contention by quoting with approval from the Commission's Report, which reads in part as follows (p. 223):

"The prohibitions of the Sherman Act apply to broadcasting. This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve * * * It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities. This is the standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals. . . . We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent the maximum utilization of radio facilities in the public interest."

We submit that such a view without more would support the Board's action in conditioning the entry of a bank into the Federal Reserve System against affiliation with so gigantic a banking empire as that controlled by Transamerica. The Board could say, as did the Communications Commission, that "The prohibitions of the Sherman Act apply to [banking]"; and that, even though "not charged with the duty of enforcing that law, [it] should administer its regulatory powers with respect to [banking] in the light of the purposes which the Sherman Act was designed to achieve."

As indicated above, however, we are not limited here to arguing on the basis of the Board's *general* power to consider the national policy against monopoly in passing upon membership applications, for by Section 11 of

the Clayton Act[12] (15 U. S. C. 21) Congress has placed *direct* responsibility in the Board to enforce certain statutory prohibitions contained in that Act, including those contained in Section 7[13] (15 U. S. C. 18). The latter section prohibits the acquisition by one company engaged in commerce of the stock of another company engaged in commerce, or the acquisition by one company of the stock of two or more companies engaged in commerce, where the effect of either type of acquisition

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[12] "Authority to enforce compliance with sections 13, 14, 18 [Section 7], and 19 of this title by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission, where applicable to common carriers subject to chapters 1 and 8 of Title 49; in the Federal Communications Commission, where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to chapter 9 of Title 49; in the Board of Governors of the Federal Reserve System, where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission, where applicable to all other character of commerce, . . ."

[13] "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

will result in substantially lessened competition or will tend to create a monopoly.

The plain import of this grant of authority is that Congress intended the Board actively to concern itself with carrying out the anti-monopoly policy of our Government in the banking field. And it is particularly pertinent here to note that this phase of the Board's direct responsibility deals with *acquisitions of stocks* having the prohibited effect noted above. Surely such a direct Congressional mandate is one which may properly color any decision by the Board on any matter within its jurisdiction, including the admission of banks to System membership. That it might have influenced the Board in the imposition of Condition No. 4 is a consideration which can hardly be ignored in the face of the figures set out above. Thus we have still another valid "purpose" to support the Condition.

We think it clear from the above discussion that the facts before the lower court would have justified a finding that the Board might have been acting from any one or all of a number of lawful motives in imposing Condition No. 4. Under these circumstances, even if it be assumed that, as found by the majority below, the Board also acted from a desire to "control the size of Transamerica" and that such motive was improper, the latter facts would not affect the validity of Condition No. 4, for this Court has said that "if the order is justified by a lawful purpose, it is not rendered illegal by some other motive in the mind of the officer issuing it . . ." *Isbrandtsen & Moller Co.* v. *United States*, 300 U. S. 139. Cf. *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163, 184; *United States* v. *Chemical Foundation*, 272 U. S. 1, 14-15; *Water Service Co.* v. *Redding*, 304 U. S. 252, 254; *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 560.

II.

THERE IS NO BASIS FOR THE ACTION OF THE LOWER COURT IN REWRITING THE CONDITION.

The opinion below having invalidated Condition No. 4 according to its literal terms, goes on to point out a number of "concessions" which are alleged to have been made by the Board and its counsel since the initiation of these proceedings. These "concessions" according to the court had the effect of modifying the literal terms of Condition No. 4 to mean that "if the Board of Governors should determine, after hearing, that Transamerica's ownership of the bank's shares has resulted in a change for the worse in the character of the bank's personnel, in its banking policies, in the safety of its deposits or in any other substantial way, it may require the bank to withdraw from the Federal Reserve System." (R. 131). Treating the Condition as so modified the majority below held the Condition valid but instructed the District Court to enter a declaratory judgment limiting its validity accordingly.

The effect of this ruling is to emasculate the Condition. Indeed, the court specifically states that, as modified, the Condition "means no more, and gives the Board no greater authority, than standard Condition No. 1, which is that subject bank at all times shall conduct its business and exercise its powers with due regard to the safety of its depositors, . . . :'" (R. 130). As we shall show, however, there is no justification for the action of the majority in thus stripping the Condition of its vitality.

One of the sources of the so-called "concessions" found by the lower court was a certain resolution passed by the Board on January 28, 1946, a date more than a month after the filing of the complaint herein. It reads as follows:

"Upon consideration of the latest report of examination of the Peoples Bank, Lakewood Village, California, from which the Board concluded that there had been no substantial change in the control, management or policy of the bank resulting from the acquisition by Transamerica Corporation of certain shares of the bank's stock, the Board, by unanimous vote, decided that there was no present need in the public interest for any action by the Board with respect to the condition of membership of the bank relating to acquisition of its stock by Transamerica Corporation." (R. 10-11)

This resolution was submitted to the District Court in support of the Board's motion to dismiss the complaint for lack of a justiciable controversy (R. 10). It was intended to show, and only to show, that the Board had neither acted nor threatened to act under the Condition at the time this suit was brought. In fact the majority below recognized this as the real purpose of the resolution, for in its opinion it calls attention specifically to the fact that the resolution "was primarily intended as an aid to the appellees' motion to dismiss the complaint" (R. 129). Such being the admitted purpose of the resolution, and there being nothing in its literal terms to suggest that the Board entertained the additional purpose of administratively interpreting Condition No. 4, we think the lower court's conclusion that it was so intended is wholly gratuitous.

But even if we treat the resolution as an administrative interpretation of Condition No. 4, such an approach still would not vindicate the conclusion reached below. Nothing in the language of the resolution suggests that the Board intended to limit its right to act thereunder only after a finding "that Transamerica's ownership of the bank's shares has resulted in a change for the worse in the character of the bank's per-

sonnel, in its banking policies, [or] in the safety of its deposits . . . ." On the contrary, the language of the resolution clearly implies that if in the future Transamerica's acquisition should cause any substantial change in the Bank's control, management or policy the Board would feel free to invoke the Condition without the necessity of making any additional finding such as that required by the lower court. This is entirely consistent with the original Condition, which empowered, but did not require, the Board to take action if Transamerica acquired "any interest" in respondent. Certainly such language does not justify the conclusion, reached below, that in adopting the resolution the Board intended to limit its powers under Condition No. 4 to those which it already possessed under Standard Condition No. 1.

The other "concessions" found by the lower court consisted of two extracts from petitioners' brief below. Aside from the fact that these extracts are separated in the majority opinion from the context in which they were submitted below, the literal texts of these statements do not support the conclusion reached by the majority. Like the Board's resolution just discussed, both were directed to showing a lack of a justiciable controversy. The first[14] pointed out that the Condition

[14] "Condition No. 4, however, is not self-executing, as appears on its face. And the Board, in affixing the Condition in the light of the opinion which it then entertained as to the potential danger of Transamerica affiliation, did not by so acting declare in advance what its administrative decision might be if and when Transamerica should acquire some of appellant's shares. In affixing the Condition—by agreement with appellant—the Board intended to leave to future determination what action, if any, might be necessary pursuant thereto. Considerations of the public interest demanded that the Condition be imposed; the same considerations will determine when, if ever, the Condition need be enforced." (R. 130)

on its face was not self-executing—that its terms plainly required further Board action before the Condition might validly be invoked. The second[15] was a footnote to that portion of petitioners' argument which emphasized that the sixty days' notice provided for in the Condition negatived the idea of any imminent threat to respondent's status as a member bank. It pointed out that, even if the sixty days' notice were sent and respondent refused voluntarily to withdraw, as agreed, then, under Section 9(8) (12 U. S. C. 327) of the Act[16] a hearing before the Board would be required before respondent could be expelled for breach of the Condition; and that this rendered even more remote respondent's alleged cause of action. Nothing in the literal language of those statements is inconsistent with or negatives the right of the Board to take action under

[15] "Even should appellant, if and when it receives such notice, take no action pursuant thereto, its membership could not be summarily forfeited. Section 9 of the Act (46 Stat. 250, 251, c. 207, U. S. C., Title 12, § 327) provides that, while the Board may order such a forfeiture, it can only do so 'after hearing' and a finding that appellant 'has failed to comply with the provisions of . . . [the law] or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto . . .' Appellant's alleged danger is thus rendered even more remote." (R. 131)

[16] Section 9(8) reads as follows:

"If at any time it shall appear to the Board of Governors of the Federal Reserve System that a member bank has failed to comply with the provisions of this section or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto, or has ceased to exercise banking functions without a receiver or liquidating agent having been appointed therefor, it shall be within the power of the board after hearing to require such bank to surrender its stock in the Federal reserve bank and to forfeit all rights and privileges of membership. The Board of Governors of the Federal Reserve System may restore membership upon due proof of compliance with the conditions imposed by this section."

the Condition whenever it might appear appropriate to do so. Nor do they even remotely suggest that before the Board can take such action it must first find, after hearing, that the Transamerica ownership of respondent's shares has affected deleteriously respondent's personnel, policies, or the safety of its deposits. All that they do suggest is that, should respondent fail to withdraw from membership after it receives the sixty days' notice, the Board, before it could lawfully expel respondent, must first find, after hearing, that respondent "has failed to comply with the provisions" of the Act—in this case with a condition lawfully imposed pursuant to Section 9 of the Act. This "concession" was no more than the Act requires, and the Board, of course, still adheres to it.

We submit that the conclusion drawn by the lower court from these statements and the resolutions set out above, that condition No. 4 means "no more, and gives the Board, no greater authority, than standard Condition No. 1", is plainly a *non sequitur*. And further, we submit, its action in thus rewriting the Condition is in direct conflict with the "fundamental principle", which this Court emphasized in *American Power & Light Co. v. Securities and Exchange Commission*, 329 U. S. 90, 112, "that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" Cf. *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 194.

III.

RESPONDENT IS ESTOPPED FROM ASSERTING THE INVALIDITY OF CONDITION NO. 4.

The District Court dismissed the complaint solely on the ground of estoppel. It pointed out that not only did respondent's directors and stockholders willingly comply with the requirements of the Board's letter of March 11, 1942, but also that respondent had "voluntarily agreed to [Condition No. 4] and on the basis of that agreement was admitted to membership in the Federal Reserve System, and for several years has received the benefits of membership in that System."[17] The court further stated:

> "The condition here is clearly not one outside the domain of the Federal Government. Here the defendant Board, with discretionary power to admit or to refuse to admit the plaintiff to the privilege of membership in the Federal Reserve System, imposed a condition which was not merely acquiesced in but agreed to by the plaintiff. The claim that this agreement was brought about by

[17] To mention some of the advantages which accrue to a bank as a result of its admission to the System: It can borrow at its Federal Reserve Bank at any time on any sound asset; it can obtain currency promptly and dependably from its nearby Federal Reserve Bank or branch without transportation charge; it collects and clears checks, drafts, bills, etc., through the nationwide clearing system of the twelve Federal Reserve Banks and their twenty-four branches; it can effect prompt telegraphic transfers of funds through the Federal Reserve Bank or branch; it has the use of Federal Reserve Bank facilities in buying and selling Government securities; it has the privilege of depositing its securities in the vaults of the Federal Reserve Bank for safekeeping, collection of interest coupons, redemption, etc. In addition to these services, a member bank has a prime investment in its holding of Federal Reserve Bank stock, which pays a six per cent dividend. Furthermore, as here, System membership automatically entitles a member bank to federal deposit insurance coverage.

duress of the plaintiff is, I think, without foundation. The agreement was voluntarily made, it was acted on and the plaintiff received the benefits which arose from its admission to membership in the System. I see nothing contrary to public policy in the condition agreed upon by the parties; indeed, it may well be that the condition imposed was within the Board's discretion if it was of the opinion that unsound banking policies were being pursued by Transamerica and that the character of management of this plaintiff bank, if Transamerica obtained control, would be detrimental to sound banking." (R. 116-117)

The majority below reversed the District Court on this ruling, stating, *inter alia*, as follows:

> "Whether estoppel has arisen, whether waiver has occurred, depends entirely upon whether Condition No. 4 is valid or invalid. No administrative body has authority to contract with a regulated corporation in a manner contrary to the statute which is being administered, nor in a way which does not give effect to the intent of Congress. The regulated corporation, by accepting such an invalid condition imposed by a regulatory authority, does not thereby waive the right to rely on the statute, and the right later to denounce the provision which contravenes it." (R. 132)

We submit that the decision below ignores fundamental principles which define the circumstances under which estoppels arise. Whether waiver or estoppel has occurred in a particular case is clearly unrelated to the merits of the ultimate right asserted. Indeed, if proven, either precludes judicial inquiry into the merits of such claim. In holding that whether waiver or estoppel has been shown in this case "depends entirely upon whether Condition No. 4 is valid or invalid," the majority below

has virtually eliminated both as defenses to any suit in which administrative action is challenged, a result which might be productive of great mischief in the administration of many regulatory schemes.

As we have seen, the Board is expressly authorized by the Act to impose conditions of membership and, as the District Court pointed out, the Condition here is "clearly not one outside the domain of the Federal Government." And certainly respondent was under no compulsion to accept the Condition without first making the objection which it now makes. Nor does respondent suggest any valid reason why it did not then resort to the courts to test the validity of that objection. Under such circumstances, we submit, the Board, as a public agency, is as much to be protected against the unconscionable conduct of those with whom it deals as are private litigants under similar circumstances.[18]

We think the analogy is strong between the circumstances in the case at bar and those in numerous others in which this Court has held that one who obtains the privileges or benefits under a statute is thereafter estopped from challenging other provisions of that stat-

[18] ". . . appellee adopted a course of conduct consistent throughout only with its apparent purpose to comply with the order; and now, without tendering any excuse for the belated disclosure of its real purpose, it asks relief from the condition only after it has enjoyed benefits which it cannot be said would have been granted without the condition. Neither this Court nor the court below is acting any the less as a court of equity because its powers are invoked to deal with an order of the Interstate Commerce Commission. The failure to conform to those elementary standards of fairness and good conscience which equity may always demand as a condition of its relief to those who seek its aid, seems to require that such aid be withheld from this appellee. See *Davis* v. *Wakelee*, 156 U. S. 680." Stone, J., dissenting, *United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, 342.

ute, even on constitutional grounds. For example, in *Fahey* v. *Mallonee*, 332 U. S. 245, representatives of the Long Beach Federal Savings and Loan Association sought to have set aside an order of the Federal Home Loan Bank Commissioner appointing a conservator for that Association. It was charged that Section 5(d) of the Home Owners Loan Act, under which the appointment of the conservator had been made, was unconstitutional because it contained a delegation of legislative authority. This Court held the Association estopped from challenging the validity of this section, saying, in part, as follows:

> "It would be intolerable that the Congress should endow an Association with the right to conduct a public banking business on certain limitations and that the Court at the behest of those who took advantage from the privilege should remove the limitations intended for public protection. It would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act to gain advantages of corporate existence is estopped from questioning the validity of its vital conditions. We hold that plaintiffs are estopped, as the Association would be, from challenging the provisions of the Act which authorize the Board to prescribe the terms and conditions upon which a conservator may be named."

Again, in *United States* v. *City and County of San Francisco*, 310 U. S. 16, the City of San Francisco, upon which Congress had conferred certain rights in the public domain upon the condition, *inter alia*, that it not dispose of or distribute the same through any private corporation or individual, challenged the validity of the condition after its enjoyment of the grant had commenced. In holding the City estopped from making such a challenge, the Court said:

"When the Raker Bill was before Congress, the City filed with the Public Lands Committee of the House a brief and argument in support of the Bill. Citing authorities, including this Court's opinions, and legislative precedents, the City submitted to Congress that as grantee it would be bound by and as grantor Congress was empowered to impose 'the conditions set forth in the Hetch-Hetchy bill.' After passage of the Bill the City accepted the grant by formal ordinance, assented to all the conditions contained in the grant, constructed the required power and water facilities, and up to date has utilized the rights, privileges and benefits granted by Congress. Now, the City seeks to retain the benefits of the Act while attacking the constitutionality of one of its important conditions."

See also *United Fuel Gas Company* v. *Railroad Commission*, 278 U. S. 300; *Pierce Oil Corporation* v. *Phoenix Refining Company*, 259 U. S. 125; *St. Louis Malleable Casting Company* v. *Prendergast Construction Company*, 260 U. S. 469; *Hurley* v. *Commission of Fisheries*, 257 U. S. 223; *Wall* v. *Parrot Silver & Copper Co.*, 244 U. S. 407.

The majority below distinguished the present case from those just cited on the ground that here "the litigant charges that the administrative body has exceeded the authority conferred upon it by a statute, but does not attack the validity of the statute." (R. 132). But we perceive no valid distinction between an estoppel applied to prevent a challenge of the constitutional authority of Congress in enacting a particular statute, and one applied to prevent a challenge of action by an administrative agency. In each case the fundamental objection to validity is that the body which has acted has done so in a manner not provided by the written law which defines its authority. And this proposition

seems to have been recognized by the Court of Appeals for the First Circuit in *White Star Bus Line* v. *People of Puerto Rico*, 75 F. 2d 889 (C. C. A. 1), certiorari denied, 296 U. S. 606, in an opinion with which the court below seemingly disagrees (R. 132). In that case suit was brought by the People of Puerto Rico to recover from defendant bus line a royalty which the latter agreed to pay as a condition to receiving a license to operate its line. The record disclosed that the bus line received a license to operate between San Juan and Rio Piedras upon condition, *inter alia*, that it pay royalties on a graduating scale over the life of the license. When suit was brought to recover the royalties, the bus line contended that the Commission was without authority to impose the royalty condition. In summarily disposing of this point the court said (pp. 891-2):

> "The franchise with the proviso added to section 2 was accepted by the bus line, which proceeded to operate under it. It still raises the issue, however, of whether the commission has the authority to impose the payment of annual royalties as a condition of receiving a franchise. Having consented to the imposition of the royalties, if the proviso were added, and operated its bus line since January 1, 1928, under the franchise, it is doubtful whether the bus line is now in a position to raise this issue. United Fuel Gas Co. et al v. R. R. Commission of Kentucky, 278 U. S. 300, 307, 308, 49 S. Ct. 150, 73 L. Ed. 390; Wall et al. v. Parrot Silver & Copper Co. et al., 244 U. S. 407, 411, 37 S. Ct. 609, 61 L. Ed. 1229."

IV.

RESPONDENT'S ACTION IS PREMATURE.

The question is also presented as to whether respondent's action was not prematurely brought. This Court has held that an indispensable element of justiciability in declaratory judgment actions against public officers

of the kind involved here is a showing of positive action or a threat to take such action by the officials involved. "The pronouncements, policies and program of [public authorities] . . ., their motives and desires, [do] not give rise to a justiciable controversy save as they [have] fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining." *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324.

The record in this case indisputably shows that the Board has neither acted nor threatened to act under the Condition. Although not acceding to respondent's demand that the Condition be cancelled, the Board, as we have seen, had concluded that there was no present need for action under the Condition. And the Condition itself requires that the Board must first give respondent sixty day's written notice of an intention to invoke it. Such a period would afford respondent ample time within which to test its rights, if any, to have the Condition reviewed by the courts. Clearly, therefore, the majority below were in error in concluding that a legal threat is implicit in the Condition itself.

In this posture of the case it appears that respondent is merely attempting to secure judicial determination of a matter as to which admittedly there is a difference of opinion between itself and the Board, but which has not yet reached an adversary stage in the judicial sense, and may never do so. As this Court has said, however, the Declaratory Judgment Act does not authorize the federal courts to issue "an advisory decree" upon "hypothetical controversies which may never become real." *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 443; *Coffman* v. *Breeze Corporations, Inc.*, 323 U. S. 316, 324.

CONCLUSION.

For the foregoing reasons the judgment below should be reversed.

Respectfully submitted,

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APPENDIX.

Section 9 of the Federal Reserve Act (12 U. S. C. § 321, et seq.) provides in pertinent part as follows:

SEC. 9. Any bank incorporated by special law of any State, or organized under the general laws of any State or of the United States, including Morris Plan banks and other incorporated banking institutions engaged in similar business, desiring to become a member of the Federal Reserve System, may make application to the Board of Governors of the Federal Reserve System, under such rules and regulations as it may prescribe, for the right to subscribe to the stock of the Federal reserve bank organized within the district in which the applying bank is located. Such application shall be for the same amount of stock that the applying bank would be required to subscribe to as a national bank. For the purposes of membership of any such bank the terms "capital" and "capital stock" shall include the amount of outstanding capital notes and debentures legally issued by the applying bank and purchased by the Reconstruction Finance Corporation. The Board of Governors of the Federal Reserve System, subject to the provisions of this Act and to such conditions as it may prescribe pursuant thereto may permit the applying bank to become a stockholder of such Federal reserve bank.

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In acting upon such applications the Board of Governors of the Federal Reserve System shall consider the financial condition of the applying bank, the general character of its management, and whether or not the corporate powers exercised are consistent with the purposes of this Act.

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If at any time it shall appear to the Board of Governors of the Federal Reserve System that a

member bank has failed to comply with the provisions of this section or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto, or has ceased to exercise banking functions without a receiver or liquidating agent having been appointed therefor, it shall be within the power of the board after hearing to require such bank to surrender its stock in the Federal reserve bank and to forfeit all rights and privileges of membership. The Board of Governors of the Federal Reserve System may restore membership upon due proof of compliance with the conditions imposed by this section.

Section 12 B of the Federal Reserve Act (12 U. S. C. § 264(a), et seq.) provides in pertinent part as follows:

(c) (1) * * *

(2) After the effective date, every national member bank which is authorized to commence or resume the business of banking, and every State bank which is converted into a national member bank or which becomes a member of the Federal Reserve System, shall be an insured bank from the time it is authorized to commence or resume business or becomes a member of the Federal Reserve System. The certificate herein prescribed shall be issued to the Corporation by the Comptroller of the Currency in the case of such national member bank, or by the Board of Governors of the Federal Reserve System in the case of such State member bank: *Provided,* That in the case of an insured bank which is admitted to membership in the Federal Reserve System or an insured State bank which is converted into a national member bank, such certificate shall not be required, and the bank shall continue as an insured bank. Such certificate shall state that the bank is authorized to transact the business of banking in the case of a national member bank, or is a member of the Federal Reserve System in the case of a State member bank, and that consideration has been

given to the factors enumerated in subsection (g) of this section.

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(g) The factors to be enumerated in the certificate required under subsection (e) and to be considered by the board of directors under subsection (f) shall be the following: The financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes of this section.

Section 5144, Revised Statutes (12 U. S. C. 61), provides as follows:

"In all elections of directors, each shareholder shall have the right to vote the number of shares owned by him for as many persons as there are directors to be elected, or to cumulate such shares and give one candidate as many votes as the number of directors multiplied by the number of his shares shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and in deciding all other questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him; except that (1) this shall not be construed as limiting the voting rights of holders of preferred stock under the terms and provisions of articles of association, or amendments thereto, adopted pursuant to the provisions of section 302(a) of the Emergency Banking and Bank Conservation Act, approved March 9, 1933, as amended, (2) in the election of directors, shares of its own stock held by a national bank as sole trustee, whether registered in its own name as such trustee or in the name of its nominee, shall not be voted by the registered owner unless under the terms of the

trust the manner in which such shares shall be voted may be determined by a donor or beneficiary of the trust and unless such donor or beneficiary actually directs how such shares shall be voted, (3) shares of its own stock held by a national bank and one or more persons as trustees may be voted by such other person or persons, as trustees, in the same manner as if he or they were the sole trustee, and (4) shares controlled by any holding company affiliate of a national bank shall not be voted unless such holding company affiliate shall have first obtained a voting permit as hereinafter provided, which permit is in force at the time such shares are voted, but such holding company affiliate may, without obtaining such permit, vote in favor of placing the association in voluntary liquidation or taking any other action pertaining to the voluntary liquidation of such association. Shareholders may vote by proxies duly authorized in writing; but no officer, clerk, teller, or bookkeeper of such bank shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote. Whenever shares of stock cannot be voted by reason of being held by the bank as sole trustee, such shares shall be excluded in determining whether matters voted upon by the shareholders were adopted by the requisite percentage of shares.

"For the purpose of this section shares shall be deemed to be controlled by a holding company affiliate if they are owned or controlled directly or indirectly by such holding company affiliate, or held by any trustee for the benefit of the shareholders or members thereof.

"Any such holding company affiliate may make application to the Board of Governors of the Federal Reserve System for a voting permit entitling it to vote the stock controlled by it at any or all meetings of shareholders of such bank or authorizing the trustee or trustees holding the stock for its benefit or for the benefit of its shareholders so to vote the same. The Board of Governors of the

Federal Reserve System may, in its discretion, grant or withhold such permit as the public interest may require. In acting upon such application, the Board shall consider the financial condition of the applicant, the general character of its management, and the probable effect of the granting of such permit upon the affairs of such bank, but no such permit shall be granted except upon the following conditions:

"(a) Every such holding company affiliate shall, in making the application for such permit, agree (1) to receive, on dates identical with those fixed for the examination of banks with which it is affiliated, examiners duly authorized to examine such banks, who shall make such examinations of such holding company affiliate as shall be necessary to disclose fully the relations between such banks and such holding company affiliate and the effect of such relations upon the affairs of such banks, such examinations to be at the expense of the holding company affiliate so examined; (2) that the reports of such examiners shall contain such information as shall be necessary to disclose fully the relations between such affiliate and such banks and the effect of such relations upon the affairs of such banks; (3) that such examiners may examine each bank owned or controlled by the holding company affiliate, both individually and in conjunction with other banks owned or controlled by such holding company affiliate; and (4) that publication of individual or consolidated statements of condition of such banks may be required;

"(b) After five years after the enactment of the Banking Act of 1933, every such holding company affiliate (1) shall possess, and shall continue to possess during the life such permit, free and clear of any lien, pledge, or hypothecation of any nature, readily marketable assets other than bank stock in an amount not less than 12 per centum of the aggregate par value of all bank stocks controlled by such

holding company affiliate, which amount shall be increased by not less than 2 per centum per annum of such aggregate par value until such assets shall amount to 25 per centum of the aggregate par value of such bank stocks; and (2) shall reinvest in readily marketable assets other than bank stock all net earnings over and above 6 per centum per annum on the book value of its own shares outstanding until such assets shall amount to such 25 per centum of the aggregate par value of all bank stocks controlled by it;

"(c) Notwithstanding the foregoing provisions of this section, after five years after the enactment of the Banking Act of 1933, (1) any such holding company affiliate the shareholders or members of which shall be individually and severally liable in proportion to the number of shares of such holding company affiliate held by them respectively, in addition to amounts invested therein, for all statutory liability imposed on such holding company affiliate by reason of its control of shares of stock of banks, shall be required only to establish and maintain out of net earnings over and above 6 per centum per annum on the book value of its own shares outstanding a reserve of readily marketable assets in an amount of not less than 12 per centum of the aggregate par value of bank stocks controlled by it, and (2) the assets required by this section to be possessed by such holding company affiliate may be used by it for replacement of capital in banks affiliated with it and for losses incurred in such banks, but any deficiency in such assets resulting from such use shall be made up within such period as the Board of Governors of the Federal Reserve System may be regulation prescribe and the provisions of this subsection, instead of subsection (b), shall apply to all holding company affiliates with respect to any shares of bank stock owned or controlled by them as to which there is no statutory liability imposed upon the holders of such bank stock;

"(d) Every officer, director, agent, and employee of every such holding company affiliate shall be subject to the same penalties for false entries in any book, report, or statement of such holding company affiliate as are applicable to officers, directors, agents, and employees of member banks under section 5209 of the Revised Statutes, as amended (U. S. C., title 12, sec. 592); and

"(e) Every such holding company affiliate shall, in its application for such voting permit, (1) show that it does not own, control, or have any interest in, and is not participating in the management or direction of, any corporation, business trust, association, or other similar organization formed for the purpose of, or engaged principally in, the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds, debentures, notes, or other securities of any sort (hereinafter referred to as 'securities company'); (2) agree that during the period that the permit remains in force it will not acquire any ownership, control, or interest in any such securities company or participate in the management or direction thereof; (3) agree that if, at the time of filing the application for such permit, it owns, controls, or has an interest in, or is participating in the management or direction of, any such securities company, it will, within five years after the filing of such application, divest itself of its ownership, control, and interest in such securities company and will cease participating in the management or direction thereof, and will not thereafter, during the period that the permit remains in force, acquire any further ownership, control, or interest in any such securities company or participate in the management or direction thereof; and (4) agree that thenceforth it will declare dividends only out of actual net earnings.

"If at any time it shall appear to the Board of Governors of the Federal Reserve System that any holding company affiliate has violated any of the provisions of the Banking Act of 1933 or of any agreement made pursuant to this section, the Board of Governors of the Federal Reserve System may, in its discretion, revoke any such voting permit after giving sixty days' notice by registered mail of its intention to the holding company affiliate and affording it an opportunity to be heard. Whenever the Board of Governors of the Federal Reserve System shall have revoked any such voting permit, no national bank whose stock is controlled by the holding company affiliate whose permit is so revoked shall receive deposits of public moneys of the United States, nor shall any such national bank pay any further dividend to such holding company affiliate upon any shares of such bank controlled by such holding company affiliate.

"Whenever the Board of Governors of the Federal Reserve System shall have revoked any voting permit as hereinbefore provided, the rights, privileges, and franchises of any or all national banks the stock of which is controlled by such holding company affiliate shall, in the discretion of the Board of Governors of the Federal Reserve System, be subject to forfeiture in accordance with section 2 of the Federal Reserve Act, as amended."